IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

GENERAL DRIVERS AND DAIRY EMPLOYEES, LOCAL UNION NO. 563; LOCAL NO. 139, INTERNATIONAL UNION OF OPERATING ENGINEERS,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case.

OPINIONS BELOW

The opinions and judgment of the Court below are unreported and are printed in Appendix "A", *infra*, pp. A-1–A-7; and Appendix "B", *infra*, pp. A-8–A-9. The

decisions and orders of the National Labor Relations Board (176 NLRB No. 51; 179 NLRB No. 131; 179 NLRB No. 109) are unreported and are printed in Appendix "C", *infra*, pp. A-10–A-15; Appendix "E", *infra*, pp. A-71–A-73; and Appendix "G", *infra*, pp. A-90–A-92.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 18, 1971. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

1. Whether by entering a decree enforcing portions of the order prohibiting petitioners from engaging in secondary activity designed to force any neutral employers to cease doing business "with any other employer or person" the Court of Appeals exceed the authority granted by Section 10 (e) of the National Labor Relations Act.

STATUTES INVOLVED

The statutory provisions involved are Sections 8 (b) (4) (i) (ii) (B), 10 (c) and 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151 et seq.) They are printed in Appendix "I", *infra*, pp. 108-110.

STATEMENT

Petitioner Teamsters, with jurisdiction in the Appleton, Neenah and Menasha area of Wisconsin's Fox River Valley, has over 2000 members and contracts with over 90 employers, including the seven belonging to the Fox Valley Construction Materials Suppliers Association that is charging party in these cases. Petitioner Engineers, a local union having jurisdiction throughout the entire State of Wisconsin, has over 5,000 members employed by hundreds of contractors and is organized into nine dis-

trict and subdistrict offices, only one district of which (Appleton) is involved in these cases. Association members employed over 150 members of petitioner Teamsters and over 50 members of petitioner Engineers. In 1968 after separate contracts between the Association and each Union expired, members of each Union struck firms belonging to the Association in order to secure renewal of these collective bargaining agreements.

Some members of the Association were engaged solely as suppliers of ready-mixed concrete and sand, gravel or aggregate to various contractors in the construction industry. Others, including Courtney & Plummer, also acted as contractors themselves for certain projects. Most of the work done by Union members working for Association members is performed away from their own premises or yards. Shortly after the strikes commenced, the employers hired replacements and reinstituted their operations. Members of petitioner Teamsters were on strike for ten and one-half months before gaining a contract; it took members of petitioner Engineers almost two years to reach agreement.

Before the strike was settled, petitioner Teamsters picketed Association members at between 40 and 50 projects where they had attempted to continue in business through the use of replacements and strikebreakers. Although the Association filed many secondary boycott charges during the strikes, the Board is here with only eight projects where it found one or both Unions to have transgressed those lines "more nice than obvious" which distinguish legitimate primary from forbidden secondary activity.[1] Not one of the incidents before the Court of Appeals involved any primary employer who did not belong to the Association; not one of these incidents arose out

[1] **Local 761, Electrical Workers v. NLRB (General Electric Co.)**, 366 US 667 (1961).

of any dispute other than petitioners' strikes against the Association; and, before the incidents in question, neither petitioner had ever been subject to a secondary boycott order entered by a United States Court of Appeals.[2]

In the face of these considerations, the Board nevertheless entered, and the judgment below enforces, an order enjoining any further § 8(b)(4)(B) violations, regardless of their nature, that concern not only all other **secondary** employers (besides those involved in the incidents here) that may do business with Association members, but further any other § 8(b)(4) violations with respect to any other **primary** employer with whom **either** petitioner may have a dispute. In other words, under the decree entered below, the Board could, in civil or criminal contempt proceedings, seek to adjudicate and fine or imprison either petitioner, or any of its agents, who are hereafter charged, in any respect, with secondary boycott violations. The Court of Appeals sustained the order, noting—without further explanation—that it could be "anticipated" that each petitioner "would again resort to unlawful secondary conduct in future disputes with **other** primary employers" (App. A, p. A 17; emphasis added).

REASONS FOR GRANTING THE WRIT

The decision below, although citing **NLRB v. Express Publishing Co.**, 312 US 426 (1941), in fact conflicts with applicable decisions by this Court and with decisions on

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[2] In November, 1970, the Seventh Circuit enforced a limited secondary boycott order entered by the Board against petitioner Teamsters arising from a pre-strike incident in which members of Local 563 employed by Courtney & Plummer became derivatively involved in a § 8(b)(4) violation by respecting another union's picket line at their place of employment. **NLRB v. General Teamsters, etc., Local No. 126**, 435 F.2d 288 (7th Cir., 1970).

the same point by other United States Courts of Appeals.[3] The patently arbitrary, overreaching and punitive Board orders enforced below thwart the carefully fashioned congressional scheme for adjudication and remedy of unfair labor practice complaints, and § 8(b)(4) allegations in particular, and violate basic principles of equity applicable to court and administrative orders alike.

In **NLRB v. Express Publishing Co.**, *supra*, this Court struck down unduly broad provisions of a Board order and held that the Board's power under § 10(c) of the Act "to enter an order requiring such person to cease and desist from **such** unfair labor practice":

> "is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."
>
> 312 US at 433.
>
> "Congress did not contemplate that the courts should by contempt proceedings, try alleged violations of the . . . Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found."
>
> 312 US at 435.
>
> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed **or** that danger of their commission in the future **is to be anticipated from the course of his conduct in the past.**"
>
> 312 US at 437 (Emphasis added).

Here, the only violations relied upon by either the Board or the Court below to support the orders in question con-

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[3] Thus meeting two of the considerations governing review on certiorari set forth in Rule 19 of this Court.

cern certain allegedly neutral employers implicated by Union conduct arising or proliferating from the same lengthy strikes against one employer, the Association.[4] Therefore the most that could "persuasively" or "fairly" be anticipated from this course of past conduct could amply be met by an order limited to the named secondaries and any other neutral employer who does business with the Association.

In **Communications Workers of America v. NLRB**, 362 US 479 (1960), this Court applied **Express Publishing** principles to a decree enjoining the union from committing further unfair labor practices against the named company "or any other employer" and, citing **Express Publishing**, struck the quoted phrase from the order. During a strike against an Ohio telephone company, the unions were found to have coerced employees of the struck firm and workers loaned to it by affiliated companies in their right to refrain from participating in concerted activities. This Court, piercing through form to substance, refused to expand the scope of the order beyond the ambit of the underlying dispute:

> "Petitioners were not found to have engaged in violations against the employees of any employer other than Ohio Consolidated and we find neither justification nor necessity for extending the coverage of the

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[4] In **General Drivers, etc., Local 563, et al. (Oshkosh Ready Mix Co.)**, 186 NLRB No. 38, 76 LRRM 1787, the Board found that certain pressures by petitioners against C & P and another area concrete firm under common ownership that arose out of the Union's strikes against the Association violated § 8(b)(4). Again, however, these incidents arose or proliferated from the very same disputes with the Association that are involved here. On the other hand, in **International Union of Operating Engineers, Local No. 139 (Fox Valley Constr. Materials Suppliers, Assn.)**, 182 NLRB No. 12, 74 LRRM 1058, two entire complaints of secondary boycott activity arising from incidents later in the strike were dismissed by the Board.

order generally by the inclusion therein of the phrase 'any other employer'."

362 US at 480.

"That loaned employees of other affiliated companies were included within the ambit of petitioner's coercive acts plainly does not evidence such a generalized scheme against all telephone employees, for it was only the employment of such employees at the struck plant that brought them within the scope of the union's activities:"

362 US at 897-898.

Curiously, the opinion below reads as if this Court had never decided **Communications Workers,** in spite of its obvious teaching that an order cannot be broadened to encompass "any other employer" unless violations have been proven against other unrelated employers or the **evidence** demonstrates a generalized scheme of unlawful conduct against other employers. But the orders challenged here meet neither test, since the court below did not find petitioners to have engaged in unlawful secondary pressures involving primary employers other than Association members nor is there evidence of any threat by petitioners to violate § 8(b)(4) in the future. Thus the decision below conflicts directly with **Express Publishing** principles and clashes head on with **Communications Workers.**

It also conflicts with the uniform holdings of other Courts of Appeal, all requiring that "broad" § 8(b)(4) orders which proscribe unlawful secondary pressures in any subsequent primary dispute rest firmly on either an adjudicated practice of indiscriminate and incorrigible secondary boycotting or evidence showing a clear threat to engage in illegal conduct in future disputes. Indeed, except for the decision below, we have found no circuit decision approving such a "broad" order grounded solely on violations during the course of a single strike.

The District of Columbia Circuit has repeatedly rebuffed Board efforts to convert its appellate processes "into a labor court of the first instance by virtue of its contempt powers."[5] For example, in **Teamsters Local 554 v. NLRB**, 262 F.2d 456 (D.C. Cir., 1958), a decision presaging the strictures of **Communications Workers**, the Court of Appeals excised broad "and other [primary] employer" language in a Board order since "no threat was made to use illegal methods against 'all other employers' ", 262 F.2d at 462. Following **Communications Workers**, the D.C. Circuit has consistently narrowed Board orders in cases involving union coercion,[6] union-caused discrimination,[7] unlawful hiring hall requirements,[8] and even violations of § 8(b)(4) where the Board's order merely mentions "any other [secondary] employer" who may do business with a specified primary.[9]

Contrary to the ruling below, the Second Circuit will enforce "blanket" § 8(b)(4) orders proscribing any subsequent secondary boycott violations without limitation only if it finds a substantial number of unrelated previously adjudicated secondary boycott violations or an avowed policy to apply unlawful secondary pressures against other

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[5] **Teamsters Local No. 554 v. NLRB**, *infra*, 262 F. 2d at 462-463.

[6] **United Mine Workers v. NLRB**, 299 F.2d 441 (D.C. Cir., 1962); **Puerto Rico Drydock Terminal v. NLRB**, 284 F.2d 212 (D.C. Cir., 1960); **Brotherhood of Carpenters v. NLRB**, 286 F.2d 533 (D.C. Cir., 1960).

[7] **Local 150, Operating Engineers v. NLRB**, 273 F.2d 833 (D.C. Cir., 1959).

[8] **New York Mailers, Local 6 v. NLRB**, 316 F.2d 371 (D.C. Cir., 1963); **Pipefitters v. NLRB**, 278 F.2d 858 (D.C. Cir., 1960); **Pipefitters, Local 519 v. NLRB**, 416 F.2d 1120 (D.C. Cir., 1969); **Highway Truck Drivers v. NLRB**, 273 F.2d 815 (D.C. Cir., 1959); **Steelworkers Local 4203 v. NLRB**, 294 F.2d 256 (D.C. Cir., 1961).

[9] **Teamsters Local 282 v. NLRB**, 344 F.2d 649 (2nd Cir., 1965); **see also** 428 F.2d 994 (2nd Cir., 1970).

primary employers.[10] It reverses such orders, however, if evidence of unlawful efforts to engage in secondary activities affecting other unrelated employers is lacking.[11]

Other Circuit Courts of Appeal also require proof of other unrelated violations or of a clear intention to violate the act in the future before enforcing broad orders affecting any other primary employer. In **NLRB v. International Hod Carriers, Local 1140**, 285 F.2d 397 (8th Cir., 1960), the Board, as here, ordered the union to cease exerting secondary pressure on any neutral employer in relation to a dispute with the named primary employer "or any other employer." The Eighth Circuit upheld that portion of the order affecting all neutral employers but, citing **Communications Workers** excised the blanket injunction against unrelated secondary activities involving another primary employer:

> "[U]pon the record before us, we observe that the threats of future unlawful activities were directed and confined solely to Union's grievance with [the primary employer]; therefore that portion of the order . . . 'or any other employer' . . . being without factual support should be stricken" (285 F.2d at 404).

Likewise the First Circuit has overturned a § 8(b)(4) order relating to all primary employers, as well as all neutral employers, where the sole evidence of an intention to commit future violations was a union official's remark that they "had to start somewhere" to fight non-union subcontractors. The First Circuit stated:

> "While . . . we [have] imposed an order of this character, in that instance there had been two viola-

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[10] **NLRB v. Musician's Local 802**, 422 F.2d 850 (2nd Cir., 1970); **NLRB v. Milk Drivers Local 584**, 341 F.2d 29 (2nd Cir., 1965).

[11] **NLRB v. Local 638, Enterprise Ass'n.**, 285 F.2d 642 (2nd Cir., 1960).

> tions, in implementation of an announced policy . . . sanctioned at a union meeting, whereas here we have only a perhaps rather offhand remark by one union official. We do not think the present case is sufficiently serious'' (278 F.2d at 291).

Similar broad orders have been reversed by the Ninth Circuit [**NLRB v. Local 1065, Carpenters**, 330 F.2d 779 (9th C.A., 1964)] and by the Fifth Circuit, [**NLRB v. Operating Engineers Local 926**, 267 F.2d 418 (5th C.A. 1959)], where neither prior violations nor intent to commit future violations had been proven.

The decision below, then, stands alone in enforcing blanket § 8(b)(4)(B) orders against unions based solely upon violations arising out of single, albeit lengthy disputes against the equivalent of one employer,[12] and therefore, if only in the interest of maintaining a uniform national labor policy, these orders should be reviewed by this Court. But these orders warrant review and reversal for other reasons as well. This Court has recognized that ''picketing has traditionally been a major weapon to implement the goals of a strike'' and that ''implicit in the Act [is] that the public interest is served by freedom of labor to use the weapon of picketing.''[13] That freedom as well as the right to strike that it serves is unnecessarily and severely inhibited when unions and their members who work in common situs industries must ''for the indefinite future'' go on strike ''at the peril of a summons

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[12] Even were a "blanket" order against petitioner Teamsters to be warranted because of violations later in the dispute, petitioner Engineers stands cleared of all subsequent charges and no proceedings against it involving unrelated disputes are presently pending before the Board or the Courts of Appeals. In short, the order against petitioner Engineers is based on far weaker grounds even than that against petitioner Teamsters.

[13] **Brotherhood of R. Trainmen v. Jacksonville Terminal Co.**, 394 US 369, 385 (1969).

for contempt'"[14] on the allegation that workers in some respect have transgressed those "arbitrary, tenuous and shifting [lines] separating 'primary' from 'secondary' activities."[15] *In terrorem* sanctions of this sort, bad enough to an employer for whom labor relations is a function incidental to his business operations, have an impact far worse applied to a union whose principal activities are to represent thousands of working men in scores of bargaining units, all within the limitations of industrial democracy, rather than the more authoritarian infrastructure of corporate management.

Were it established that statutory purposes require blanket § 8(b)(4)(B) orders whenever several violations of this statute are proven in a single dispute, then the orders in question might appear less Draconian. But this is scarcely arguable in light of the arsenal of special protections and remedies which the Act affords employers aggrieved by unlawful secondary pressures: priority case handling in the Regional Offices [§ 10(1)]; a mandate that the Board seek preliminary injunctive relief from the federal district court [§ 10(1)]; and the statutory cause of action for damages arising from such conduct [§ 303]. Indeed, the risk of inconsistent district and appellate court adjudications of the legality of the same conduct, or, if not that, the potential for adminstrative circumvention of § 10(1) procedures by recourse to contempt process are additional reasons for Court review of this important question.

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[14] **NLRB v. Express Publishing,** *supra*, 312 US at 436.

[15] **Brotherhood of R. Trainmen v. Jacksonville Terminal Co.,** *supra*, 394 US at 386-387. The rules governing common situs picketing are not only subject to the "fuzziness" and "vagueness" of the basic primary-secondary dichotomy but "among the most mooted and complex under the Act." 394 US at 388-389. "The tapestry that has been woven in classifying such conduct is among labor laws most intricate." **NLRB v. Local 825, International Union of Operating Engineers,** 400 US 297 (1971).

CONCLUSION

For the reasons stated, this petition should be granted.

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